HONG SIEW KAI

v.

LIM TONG CHAN

HIGH COURT MALAYA, IPOH
ABDUL HAMID EMBONG J
[CIVIL APPEAL NO: 11-81-99]
27 SEPTEMBER 2000

CIVIL PROCEDURE: *Counsel appearing in court - Mentioning on behalf of another - Undertaking to requesting counsel and his client - Breach of undertaking - Failure to request the matter to be stood down - Matter was heard in absence of adversary*

ADMINISTRATIVE LAW: *Rules of natural justice - Failure to comply with - Lost of opportunity to be heard - Proceedings suffered serious flaw - Breach of rules of natural justice*

LEGAL PROFESSION: *Practice of law - Practice and etiquette - Mentioning on behalf of another - Undertaking to requesting counsel and his client - Breach of undertaking - Failure to request the matter to be stood down - Matter was heard in absence of adversary*

On 29 September 1999, the respondent's counsel appeared before the magistrate and he also mentioned the case on behalf of the appellant's counsel. There were two applications pending before the magistrate. Enclosure 22 was an application by the appellant's counsel for an order to discharge himself as counsel for the appellant. While encl. 23 was an application by the appellant to set aside the default judgment entered against him. The magistrate allowed encl. 22 and dismissed encl. 23 with costs. The appellant appealed.

Held:

[1] When a counsel appears before a court to mention on behalf of his adversary, he is deemed to have an undertaking, both to the court and to his opponent and client, that the matter would not in fairness be heard in the absence of his adversary. Thus, it was a breach of a counsel's undertaking to proceed with encl. 23 behind the back of his adversary and this should attract the court's intervention.

[2] As the notes of proceedings merely showed that encl. 23 was summarily dismissed with costs without the respondent's counsel even submitting on it, the proceedings therefore had suffered a serious flaw, one that struck the very root of judicial fairness.

[3] In the circumstances, justice had not in actual fact been done to the absent appellant who knew nothing of the proceedings and through no fault of his, had lost the opportunity to be heard. Therefore, in accordance with the rules of natural justice, the decision of the magistrate was a nullity and had to be set aside.

[Appeal allowed with costs; encl. 23 revived and set down for hearing.]

Case(s) referred to:

Bank Bumiputra Malaysia Bhd v. Aik Lee Feedmill Co SB & Ors [1999] 6 CLJ 1 ***(refd)***
Hamzah Atan v. Perbadanan Johor [1999] 5 CLJ 183 ***(refd)***
In re a Solicitor (Lincoln) [1966] 1 WLR 1604 ***(refd)***
Insas Bhd v. Ayer Molek Rubber Co Bhd [1995] 3 CLJ 328 ***(refd)***
Lai Yoke Ngan v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 ***(refd)***
Lee Oui Long v. Lim Chu Ahiat & Anor [1993] 2 CLJ 88 ***(foll)***
Mohd Nazri Ali v. Abdullah Sidek [2000] 2 CLJ 744 ***(refd)***
R v. Sussex JJ ex p. Mc Carthy [1924] 1 KB 256 ***(refd)***
Silver & Drake v. Baines [1971] 1 QB 396 ***(refd)***
United Mining and Finance Corporation Ltd v. Becher [1910] 2 KB 296 ***(refd)***

Legislation referred to:

Legal Profession (Practice and Etiquette) Rules 1979, rr. 19, 33
Subordinate Court Rules 1980, O. 11 r. 5, O. 28 rr. 6, 8

For the appellant - John Lee Abdullah; M/s Othman Hashim & Co
For the respondent - YK Cheah; M/s KC Lai & Co

Reported by Izzaty Izzuddin

JUDGMENT

Abdul Hamid Embong J:

This was a running down action where the defendant (appellant here) had denied liability and had entered a defence.

On 1 December 1998 a judgment in default under O. 28 r. 6 Subordinate Court Rules (SCR) was entered against the defendant for failing to appear either personally or through counsel. On 5 December 1998 defence counsel applied to discharge himself. On 10 April 1999 the defendant applied to

set aside the default judgment entered on 1 December 1998. On 29 September 1999 that application was heard and dismissed with costs by the learned magistrate. The defendant appealed to this court.

The notes of proceedings showed that on that date plaintiff's counsel appeared before the learned magistrate and also mentioned the case on behalf of defendant's counsel. The latter as well as the defendant were not present. There were two applications pending before the magistrate. Encl. 22 was the defendant's counsel's application to discharge himself. Encl. 23 was the defendant's application to set aside the default judgment (*ie* the subject of this appeal), which was supported by his solicitor's affidavit. The learned magistrate allowed the application for discharge (Encl. 22) and accordingly discharged the defendant's counsel. The learned magistrate then proceeded to hear the defendant's application at encl. 23 *ie* to have the default judgment set aside. It is not obvious from the notes of proceedings whether this application was heard at the behest of plaintiff's counsel or at the court's own motion. The notes of proceedings also do not disclose if plaintiff's counsel had advanced any submission on that application although it was noted that plaintiff's counsel said that encl. 23 should be heard first, thus inferring that it was he who has moved the court to hear the application at encl. 23. Be that as it may, the record shows that the application was dismissed with costs.

Before me, counsels for both sides had advanced the usual arguments on when this court may exercise its discretion to set aside a default judgment adverting to the various principles and procedures as held in case law authorities of:

Lai Yoke Ngan v. Chin Teck Kwee & Anor [1997] 3 CLJ 305.
Hamzah Atan v. Perbadanan Johor [1999] 5 CLJ 183.
Bank Bumiputra Malaysia Bhd v. Aik Lee Feedmill Co. SB & Ors [1999] 6 CLJ 1.
Mohd Nazri Ali v. Abdullah Sidek [2000] 2 CLJ 744.
(not applicable to this case - see O. 28 r. 8 SCR)

With respect, I had sidestepped the arguments advanced and had determined this appeal on two issues which I found to be fundamental to the propriety of the proceedings before the learned magistrate. These issues are discussed under the following heads:

The Effect Of Mentioning A Case On Behalf Of An Opposing Counsel

When the defendant's application at encl. 23 was heard and decided on 29 September 1999, it was done in the absence of the defendant or his

counsel. Counsel for the plaintiff had appeared and also mentioned the case on behalf of defendant's counsel. This court may therefore assume that plaintiff's counsel had been in communication with defendant's counsel and that both counsels must have come to an understanding that the application would not be heard in the absence of the defendant or his counsel. Such an undertaking may be inferred as it is common practice for a counsel to appear before the courts and have a matter mentioned on behalf of his absent adversary, pursuant to some arrangement or undertaking. Although not provided for under the Legal Profession Act and, seemingly there is no legal basis for such a practice, the courts over the years, have been flexible in allowing lawyers to appear and mention a case on behalf of their absent brethren. It has now become an accepted practice, one necessitated by convenience and time management in a lawyer's busy schedule. Thus, except for matters where counsels for both parties are required to be in personal attendance, the courts have been magnanimous in dispensing with counsels' presence in appropriate situations. There are, of course, various instances where the presence of counsels of both parties are not required and where it may be sufficient that only one counsel appears. Normally, that situation occurs when a matter before the court is fixed only for a mention to obtain a hearing date, or where the parties have consented to some agreements and to record the terms of settlements or to have a matter withdrawn.

In *Lee Oui Long v. Lim Chu Ahiat & Anor* (unreported Civil Appeal No: 12-17-90) see Mallal's Digest 4 edn. p. 387, the High Court at Muar had held that, when a counsel mentions a case on behalf of another requesting counsel, the attending counsel actually appears not on behalf of the requesting counsel but on behalf of the litigant, and as such, the attending counsel should be fully briefed, and be ready to fulfil counsel's duty to the court as well as to the litigant as ably as the requesting counsel. I would subscribe to that view and would add that an attending counsel who mentions on behalf of the requesting counsel also assumes an undertaking to both that counsel and his client.

Where, as in the instant case, the court had decided to proceed with the hearing of the outstanding matter, the least that the appearing counsel could do, in my view, was to have the matter stood down and inform his absent opponent, for whom he had mentioned the case. I am also of the view that when a counsel appears before a court to mention on behalf of his adversary he is deemed to have given an undertaking, both to the court and his opponent and client, that the matter would not, in fairness, be heard in the absence of his adversary. The Legal Profession (Practice and Etiquette) Rules 1979 (LPR) requires utmost good faith, openness and

fairness in counsel's conduct in such a situation. Rule 19 emphasises such conduct stating -

> 19. The conduct of an advocate and solicitor before the Court and in relation to other advocates and solicitors shall be characterised by candour, courtesy and fairness.

Similarly, an advocate is also required to treat his adversary with fairness (see r. 33 LPR). Besides that, the appearing counsel is also required to fulfil his undertaking to his adversary.

As regards a counsel undertaking it is perhaps apt to quote a few passages from the English Cpurt of Appeal decision in *Silver & Drake v. Baines* [1971] 1 QB 396 to emphasise the seriousness of the matter. That case involved a dispute between two firms of solicitors in which the legal assistant of the respondent firm had given an undertaking to repay an advance of 4000 pounds given by the appellant firm which the principal partner denied any knowledge of having been given. Although the Court of Appeal decided that it was not an appropriate case for the court to give summary judgment against the appellant firm's principal partner, the remarks made by Lord Denning MR and Widgery LJ on a solicitor's undertaking are worth repeating to apply to the instant case before me.

per Lord Denning MR -

> This court has from time immemorial exercised a summary jurisdiction over socilitors. They are officers of the court and are answerable to the court for anything that goes wrong in the execution of their office. Even if the socilitor has been guilty of no fault personally, but it is the fault of his clerk, he is accountable for it: see *Myers v. Elman* [1940] A.C. 282. This jurisdiction extends so far that if a solicitor gives an undertaking in his capacity as a solicitor the court may order him straightaway to perform his undertaking. It need not be an undertaking to the court. Nor need it be given in connection with legal proceedings.

per Widgery L.J. -

> This was not the common case of an undertaking given to the court in which any default is akin to a contempt and naturally attracts the remedy of attachment and committal. The undertaking in question here was not given to the court. It was not even given in the course of litigation. There is clear authority, however, from the earliest days that a solicitor, being an officer of the court, is liable to attachment for a breach of an undertaking even though the undertaking is not given to the court itself. But the first requirement of the exercise of that jurisdiction, as Lord Denning M.R. has pointed out, is that the undertaking in question must have been given by the solicitor in the course of his activities as

a solicitor. It must be given by him professionally as a solicitor and not in his personal capacity. The reason for that is clear enough, because a remedy of this kind is intended primarily to discipline the officers of the court, to ensure the honesty of those officers. The court is thus concerned only with their activities as solicitors, and anything done by a solicitor in his private capacity is outside this jurisdiction.

Similarly, in the instant case, this court's concern is that of the undertaking given by the appearing counsel to his opponent and the latter's client, when the matter was mentioned on behalf of both the latter. It need not be overly emphasised that an undertaking given by an advocate and solicitor in the course of their professional duties is not a matter to be lightly treated. The above quoted passages emphasise the rigid observance required on such undertakings, a breach of which will demand intervention by the courts.

In this case, even though the defendant's counsel had been discharged (when his application at encl. 22 was allowed) he remains on record as the solicitor acting for the defendant, until the sealed copy of the order for discharge had been served on the parties to the cause or matter (see O.11 r. 5 SCR). As such, it cannot be suitably said that the undertaking no longer exists to be fulfilled. I believe it was upon this wrong impression of the appearing counsel that he was no longer obliged to his absent adversary that encl. 23 was requested to be heard. However, my view is that to proceed with the outstanding application behind the back of his adversary, is, ungentlemanly conduct, or worse, in breach of a counsel's undertaking which should attract this court's intervention, or in appropriate cases, invoke its disciplinary jurisdiction where a counsel may summarily be called upon to perform his undertaking. (see *United Mining and Finance Corporation Ltd v. Becher* [1910] 2 KB 296, and *In re a Solicitor (Lincoln)* [1966] 1 WLR 1604). I hasten to add that the counsel who appeared before the learned magistrate is not the same counsel who appeared before me.

Judicial Fairness

The other important consideration which this court had taken into accout involved the fundamental question of judicial fairness.

The notes of proceedings on 28 September 1999 shows the following treatment on the defendant's application at encl. 23 -

Pohon untuk dengar Lampiran 23 dahulu.
Mahkamah: Lampiran 23 ditolak dengan kos.

As stated earlier, an inference can be made that this application was heard on the request of the appearing counsel. In the circumstances mentioned earlier on the undertaking of plaintiff's counsel who also mentioned on behalf of the defendant's counsel, I am of the view that the appearing counsel should not have asked the court to proceed with the hearing of encl. 23. Be that as it may, the record also does not show that the learned magistrate had addressed his mind whether to allow the defendant an opportunity to appear at another date to argue his application. It merely shows that encl. 23 was summarily dismissed with costs, without even the plaintiff's counsel submitting on it. In that event, I think that the proceedings below had suffered a serious flaw, one that struck the very root of judicial fairness which brings to my mind that famous dictum of Lord Hewart in *R v. Sussex JJ ex p. Mc Carthy* [1924] 1 K.B. 256, worth repeating as a timely reminder to officers exercising judicial functions. It is this -

> it is of fundamental importance that justice should both be done and be manifestly seen to be done.

This oft-quoted maxim has, over the years, also been critised as one giving an erroneous impression that justice should appear to be done rather than that it should in fact be done. However, on the peculiar antecedents of this case, I can safely conclude that justice had not in actual fact been done to the absent defendant who knew nothing of the proceeding and, through no fault of his, had lost the opportunity to be heard. It is my view that, in acting judicially in accord with the rules of natural justice, the court should also include the notion of acting fairly and the particular situation as found in this case demands that fairness be applied. The words of the learned Chief Justice in *Insas Bhd v. Ayer Molek Rubber Co. Bhd* [1995] 3 CLJ 328 may be repeated to emphasise Lord Hewart's dictum and the need for judicial fairness in such a situation as found in the instant case. He said -

> Judges and magistrates must not only act neutral and fair but be seen to act so.

In the circumstances, I am constrained to rule that the decision of the learned magistrate is a nullity and have the same set aside. Encl. 23 is hereby revived and be set down for hearing as a fresh application.

This appeal is hereby allowed with costs.